

No. 12406

United States
Court of Appeals
For the Ninth Circuit.

CLARK SQUIRE, Collector of Internal Revenue,
Appellant,
vs.

SUMNER RHUBARB GROWERS' ASSOCIA-
TION, a Cooperative Agricultural Corpora-
tion,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Southern Division.

FILED
FEB 24 1950

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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713 Smith Tower Building,
Seattle, Washington,
Attorneys for Defendant-Appellant.

In the District Court of the United States, Western
District of Washington, Southern Division

No. 1157

SUMNER RHUBARB GROWERS'
ASSOCIATION,

Plaintiff,

vs.

UNITED STATES OF AMERICA, also CLARK
SQUIRE, COLLECTOR INTERNAL
REVENUE,

Defendants.

COMPLAINT

Comes now the plaintiff, pursuant to section 24, sub-section 20 of the Judicial Code, as amended, (28 U.S.C.A. sec. 40, sub-section 20, 24 Stat. 505), and for a cause of action complains and alleges as follows:

I.

That the Sumner Rhubarb Growers Association is a co-operative agricultural corporation, organized under the laws of the State of Washington, chapter 19 of Session Laws of 1913.

II.

That Clark Squire is now and was at all times hereinafter mentioned, the duly appointed, qualified and acting Collector of Internal Revenue for the State of Washington and Territory of Alaska.

III.

That the purposes for which the said association is formed are to pack, process, can, store, warehouse, handle and market fruit, vegetables, rhubarb and other agricultural and horticultural products, grown in the State of Washington, and to buy, process, pack, handle and sell all kinds of agricultural and horticultural products, both for its own account and on commission for others, and to contract accordingly, and operate warehouses, canneries, cold storage plants, packing houses, wherever necessary or expedient in the carrying on of the business; that the primary purpose for the organization of the association is to handle the agricultural and horticultural products of its members upon a co-operative basis, and to handle all of such products of members who shall sign the standard marketing agreement of the association upon the basis of actual cost to the association, and an amount apportioned over the entire operations of any one season.

That the plaintiff has been engaged during the period for which the claims referred to hereinafter will cover, in Sumner, Washington, which is located within the Western district of Washington, southern division.

That during said periods the plaintiff has been engaged in warehousing, packing and selling rhubarb grown by its farmer members in the Sumner Valley; that all of the rhubarb handled by the plaintiff has been grown on the farm of members of the association, and practically all of the rhubarb

sold is shipped from packing on the farm where it is grown; that the rest of the rhubarb which the plaintiff has handled during the period in question, is packed at the plaintiff's warehouse in Sumner, Washington; that all of the rhubarb, after being packed, is shipped from the plaintiff's rented warehouse.

IV.

That the operation of the Sumner Rhubarb Growers' Association, during the period for which said claims have been filed, were seasonal, extending from January to the middle of May of each year.

V.

That during the year 1931 the plaintiff established a status of exemption with the United States Internal Revenue Department under section 103 (12) of the Revenue Act of 1928, and has maintained its tax exempt status for the years during the period from October 1, 1942, to June 30, 1946, for which the United States Collector of Internal Revenue has demanded that the plaintiff pay social security tax.

That for the period from October 1, 1942, to December 31, 1942, the plaintiff paid \$3.38, which payment was made January 9, 1943.

That the plaintiff paid social security tax for the period from January 1, 1943, to December 31, 1943, the sum of \$130.19, said payment being made quarterly from April 6, 1943.

That the plaintiff paid social security tax for the period from January 1, 1944, in the sum of \$137.27,

said payment being quarterly from April 11, 1944.

That the plaintiff paid social security tax for the period of January 1, 1945, to March 31, 1945, the sum of \$70.11, said payment being made April 13, 1945.

That the plaintiff paid social security tax for the period from January 1, 1946, to June 30, 1946, payments of the same in the amount of \$25.08 being made April 24th and July 30th, 1946.

That there has been duly filed with the defendant, Nov. 18, 1946, a claim for refund for each of the periods set forth above, copies of said claims being marked Exhibits "A," "B," "C," "D," "E," and made a part hereof by this reference.

That more than six months have expired since the filing of the said claims and each of them, and no refund has been made by the defendant.

That by letter of June 24th, written by Victor H. Self, Deputy United States Commissioner, plaintiff was advised that claim #499930, being exhibit "E" herein, was disallowed, and that remaining claims were being adjusted in accordance with the ruling.

That in accordance with the Commissioner's ruling, the defendant denied refund under plaintiff's claims for the following employees: Manager, assistant manager, and all stenographers and office employees.

That as a result of said ruling the plaintiff will still have due and owing him the following amounts, as set forth hereinafter: for the year 1943 the sum of \$22.03; for 1944, the sum of \$27.00; for 1945 the

sum of \$15.03; for 1946 the sum of \$25.08; that the total due as a refund is the sum of \$89.14.

Wherefore, the plaintiff prays for judgment of this court in the sum of \$89.14, with interest at six percent. per annum.

And for such other relief as to the court may seem just and equitable.

/s/ JOHN W. FISHBURNE,
Attorney for Plaintiff.

United States of America,
County of Pierce,
State of Washington—ss.

E. S. Watts, being first duly sworn, on his oath deposes and says:

That he is the attorney-in-fact for the plaintiff, Sumner Rhubarb Growers' Association, in the above entitled cause; that he has read the foregoing complaint, knows the contents thereof, and says the same is true.

/s/ E. S. WATTS,
Attorney-in-fact for Sumner Rhubarb Growers'
Association.

Subscribed and sworn to before me this 9 day of August, 1948.

[Seal] /s/ T. W. KENNARD,
Notary Public in and for the State of Washington,
residing at Tacoma.

EXHIBIT A

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association,

Business address P. O. Box 86, Sumner, Wash-
ington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Oct. 1, 1942, to Dec. 31, 1942
3. Character of assessment or tax Social Security
4. Amount of assessment, \$6.76; dates of payment Jan. 9, 1943
5. Date stamps were purchased from the Government
6. Amount to be refunded \$3.38
7. Amount to be abated (not applicable to income, gift, or estate taxes).....\$.....
8. The time within which this claim may be legally filed expires, under section 3313 of (Revenue Act or Internal Revenue Code) on January 9, 1947

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago.
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Social Security Act, as Amended, Sec. 209(b) (10) (B) and Sec. 209(b) (1).
7. Only the Associations' share is claimed above. The employees will file their own claims.

/s/ WM. McCLANE

Secretary-Treasurer

Subscribed and sworn to before me this 18 day
day of November, 1946

/s/ MARGARET BOWEN

Notary Public

EXHIBIT B

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association

Business address P. O. Box 86, Sumner, Wash-
ington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed
Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Jan. 1, 1943, to Dec. 31, 1943
3. Character of assessment or tax Social Security
4. Amount of assessment, \$260.38; dates of payment
Quarterly from April 6, 1943
5. Date stamps were purchased from the Government
6. Amount to be refunded \$130.19
7. Amount to be abated (not applicable to income, gift, or estate taxes)\$.....
8. The time within which this claim may be legally filed expires, under section 3313 of Revenue Act of 1939 on April 6, 1947 or no earlier

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago.
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Only the part paid by the Association is claimed herewith. The employees will file their own claims.
7. Social Security Act, as Amended, Sec. 209(b) (1) and Sec. 209 (b) (10) (B).

/s/ WM. McCLANE

Secretary-Treasurer

Subscribed and sworn to before me this 18 day
day of November, 1946

.....

Notary Public

. EXHIBIT C

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association

Business address Box 86, Sumner, Washington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed
Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Jan. 1, 1944, to Dec. 31, 1944
3. Character of assessment or tax Social Security
4. Amount of assessment, \$274.54; dates of payment
Quarterly from April 11, 1944
5. Date stamps were purchased from the Government
6. Amount to be refunded \$137.27
7. Amount to be abated (not applicable to income, gift, or estate taxes).....\$.....
8. The time within which this claim may be legally filed expires, under section 3313 of Revenue Act of 1939 on April 11, 1948 or no earlier.

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago. .
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Only the part paid by the Association is claimed herewith. The employees will file their own claims.
7. Social Security Act, as Amended, Sec. 209(b) (1) and Sec. 209 (b) (10) (B).

/s/ WM. McCLANE

Subscribed and sworn to before me this 18 day
day of November, 1946

.....

Notary Public

EXHIBIT D

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association

Business address Box 86, Sumner, Washington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed
Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Jan. 1, 1945, to Mar. 31, 1945
3. Character of assessment or tax Social Security
4. Amount of assessment, \$140.22; dates of payment April 13, 1945
5. Date stamps were purchased from the Government
6. Amount to be refunded \$70.11
7. Amount to be abated (not applicable to income, gift, or estate taxes).....\$.....
8. The time within which this claim may be legally filed expires, under section 3313 of Revenue Act of 1939 on April 13, 1949 or no earlier.

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago.
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Only the part paid by the Association is claimed herewith. The employees will file their own claims.
7. Social Security Act, as Amended, Sec. 209(b) (1) and Sec. 209 (b) (10) (B).

/s/ WM. McCLANE

Secretary-Treasurer

Subscribed and sworn to before me this 18 day
day of November, 1946

.....

Notary Public

EXHIBIT E

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association

Business address Box 86, Sumner, Washington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed
Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Jan. 1, 1946, to June 30, 1946
3. Character of assessment or tax.....
4. Amount of assessment, \$50.16; dates of payment
April 24 and July 30, 1946
5. Date stamps were purchased from the Government
6. Amount to be refunded \$25.08
7. Amount to be abated (not applicable to income, gift, or estate taxes).....\$.....
8. The time within which this claim may be legally filed expires, under section 3313 of Revenue Act of 1939 on April 24, 1950 or no earlier.

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago.
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Social Security Act, As Amended, Sec. 209(b) (10) (B) and Sec. 209(b)(1).
7. Only the Associations' share is claimed above. The employees will file their own claims.

/s/ WM. McCLANE

Secretary-Treasurer

Subscribed and sworn to before me this 18 day
day of November, 1946

.....

Notary Public

[Endorsed]: Filed August 13, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants by their attorneys, the undersigned, and move that the complaint of the plaintiff be dismissed on the ground and for the reason that there is a misjoinder of parties defendant.

See Stark v. United States,
14 F. (2d) 616. (headnote 2).

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ HARRY SAGER,
Assistant U.S. Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the
Chief Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed December 16, 1948.

[Title of District Court and Cause.]

ORDER DISMISSING UNITED STATES
OF AMERICA

The above matter coming on regularly before the Court this day upon the defendants' Motion to Dismiss, the hearing having been noted by plaintiff's counsel. And the plaintiff not appearing by counsel or otherwise and the defendants appearing by Harry Sager, Assistant United States Attorney, and the Court having fully considered the matter, it is

Ordered that the United States of America be and it is hereby dismissed as a defendant in the above-entitled cause and the plaintiff's complaint is dismissed as to the United States of America.

It Is Further Ordered that the defendant Clark Squire, Collector of Internal Revenue, shall have thirty days from this date in which to file his Answer to the plaintiff's complaint.

Done In Open Court this 17th day of January, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Presented by:

/s/ HARRY SAGER,
Asst. U.S. Attorney.

[Endorsed]: Filed January 17, 1949.

[Title of District Court and Cause.]

ANSWER

The defendant by J. Charles Dennis, United States Attorney for the Western District of Washington, answering the complaint, generally denies all the averments thereof except such designated averments as he expressly admits.

The defendant further answers as follows, the numbers of the following paragraphs corresponding respectively to the numbers of the paragraphs of the complaint.

I.

The defendant denies these averments.

II.

The defendant admits these averments.

III.

The defendant is without knowledge or information sufficient to form a belief as to the truth of these averments.

IV.

The defendant is without knowledge or information sufficient to form a belief as to the truth of these averments.

V.

The defendant denies these averments except he admits the averments with respect to (a) exemption under Section 103(12) of the Revenue Act of 1928, granted the plaintiff in the year 1931; (b) tax pay-

ments in certain amounts for certain periods; and that claims for refund were filed more than six months prior to the commencement of the action, of which the five lettered Exhibits are true copies, and that there have been no refunds of any taxes referred to therein.

The defendant says that by letter dated July 24, 1948, from Deputy Commissioner of Internal Revenue, plaintiff was advised that its claim numbered 499930, of which Exhibit "E" is a true copy, was disallowed and that the remaining claims were being adjusted in accordance with a ruling contained in a letter from the said Deputy Commissioner of said date to the plaintiff's representatives, which speaks for itself.

The defendant further says that the exemption granted the plaintiff in 1931, referred to above, was revoked, as of January 1, 1939, the effective date of the Internal Revenue Code, and that the plaintiff was so informed by a letter from the Deputy Commissioner dated March 12, 1948.

Wherefore, the defendant prays that judgment be entered for the defendant with costs.

/s/ J. CHARLES DENNIS,
United States Attorney,
Attorney for Defendant.

/s/ HARRY SAGER,
Asst. U.S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1949.

In the District Court of the United States for the
Western District of Washington, Southern
Division

Number 1157

SUMNER RHUBARB GROWERS'
ASSOCIATION,

Plaintiff,

vs.

CLARK SQUIRE, Collector Internal Revenue,
Defendant.

PROCEEDINGS

Transcript of Oral Decision given by the Honorable Charles H. Leavy, United States District Judge, in the above-entitled cause in the above-entitled court, on the 16th day of May, 1949, at Tacoma, Washington.

Appearances:

JOHN W. FISHBURNE, ESQ.,

Tacoma, Washington,

Appeared for the Plaintiff;

THOMAS R. WINTER, ESQ.,

Assistant United States Attorney,

Appeared for the Defendant.

Testimony and other evidence having been offered, and arguments having been made by the

respective counsel, the following proceedings occurred:

The Court: I think, Mr. Winter, I am prepared to make a disposition of this.

Mr. Winter: If your Honor holds that they are agricultural—I am wondering—if you hold they are exempt by 101(1), I don't think there is any evidence that they are exempt under that Statute and entitled to exemption.

The Court: We have here the question for determination, as I understand it, whether or not this cooperative agricultural association was properly assessed for Social Security Tax upon two of its employees for a period of three years.

The amount involved is small but the principle, of course, is one that is of great importance, not only to the tax payer but to the Government in many other similar cases and it is for that reason that I was desirous of getting clearly in mind just what the issues are.

This question of what constitutes agricultural labor has been troublesome since it was first written into the Act. Not only do you have the responsibility of its administration but the Courts in their determination have to decide what Congress meant. After the original enactment, it was sought to be clarified by the amendment.

There is no dispute now, however, as to the existing law and no dispute as to the facts in light of the record as here made and the facts clearly establish that here is an "organization" set up under the

provisions of the laws of the State of Washington on a cooperative basis to deal with a single agricultural product, to-wit, rhubarb.

There might be some argument made as to whether rhubarb is a fruit or a vegetable, but it certainly is one or the other. Some people might classify it one way and some another way.

The organizational set up is such that it will handle only the growers' products and not the product of anyone on the outside.

The central collection depot is provided where the grower, under the direction of the officers of the cooperative, packs his product to get certain standards, and then it is hauled in from the farms by employees of the cooperative and then shipped to places where it is sold, and then by the buyer, I assume, distributed to the ultimate consumer.

The organization itself is a small membership in the neighborhood of one hundred growers. It is a seasonal operation continuing for a period of about four months in the year.

Aside from its officers, as provided for by its Articles of Incorporation, it has the employees that I have referred to who do the trucking and the hauling and the loading. And then it has the accounting employees. In this case there are two in number and they are working for a salary during this four month period which is involved in this controversy.

Now, when we turn to the law—and I am not going to cite numerous authorities because I haven't

had an opportunity to run them down and rarely will you find authorities that have identical facts, and none of those are cited—this case, cited in 152 Federal 837, *Birmingham vs. Rucker Breeding Farms*, which is a Court of Appeals case from the Eighth Circuit, more nearly fits our situation than any of the other citations; although it isn't squarely in point because the language is not comprehensive in the statutory definition of agricultural laborer. However, turning to that definition found in U.S.C., Title 26, Section 1426, subsection 8 of subsection 4, we have this language that is quite applicable to the problem now before us, and it reads as follows:

“The term agricultural labor includes all services in handling, planting, drying, picking, packing, packaging, processing, freezing, grading, storing or delivering to storage or to markets or to a carrier for transportation to market, any agricultural or horticultural commodities but only if such service is performed as an incident to the ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market.”

The government concedes here that everyone who participates in these activities in the time involved is within the exemptions that the Court read excepting the two individuals that I have referred to before, who kept the accounts and wrote the checks and looked after the finances and made the disbursements. It contends that they would not be persons who would be classified as being employed

as incident to the preparation of such fruits and vegetables for market and, therefore, would not be exempt from Social Security Tax.

The Act that I have just read, standing alone, might not be sufficient to cover the situation so we refer to Title 26, Section 101, subdivision 1, and subdivision 12. The contention of the Plaintiff is that these office employees fall under subdivision 1, which is a general definition, and the contention of the Government is that they fall under subdivision 12, and if they do fall under subdivision 12, then the Government should prevail here.

I am unable to determine that Congress could possibly have had in mind a distinction such as is sought to be made between this comprehensive language in subdivision 1, "labor—agricultural or horticultural," and subdivision 12.

There is no question at all in the mind of the Court that the record as here made brings this cooperative within the provisions of subsection 12. But, by being brought within the language of that subsection, I can not assume that they are excluded from the broader language of subsection 1, which classifies the following organizations as exempt from taxation under this chapter, as being those that are labor organizations and agricultural or horticultural organizations.

We have here an agricultural organization; or, if you classify rhubarb as a fruit, it is a horticultural organization.

It is a cooperative.

Its function is not a profit making business.

The processing of this rhubarb, under the cooperative's direction, is done on the farm and hauled to a central point and there distributed.

In order that it can function as a cooperative agricultural or horticultural organization, it must of necessity have someone employed to keep books and records.

I doubt that even in this small operation the bookkeeper and the *account*, or whatever their designations are, or whether the employee was actually handling crates of rhubarb, is important. It seems to this Court an absurdity that everybody identified with this farm marketing organization is exempt except those who kept the records and that they should be subject to tax.

I am convinced that the interpretation placed upon the language of the Act—and had there been any regulation that would seem to be contrary to the language of the Act, with all due respect for the Department, I would not feel warranted in following them—but I am convinced that the Internal Revenue Department did not have the full understanding of the operation of this organization, a cooperative association, or they would never have arrived at the conclusion which they did.

I suggested at the outset here, to counsel, that the letter from the Department introduced in evidence seemed to indicate some feeling on the part of some employee of the Internal Revenue Department that because their demands had not been met and their commands had not been obeyed they arbitrarily proceeded to assess the tax. But the

Court was advised that this assessment dealt with income taxes rather than Social Security Tax.

I appreciate that anyone who attacks anything concerning Federal taxes has the burden of proving their contention. The rule of construction is one of rather strict construction against the taxpayer, but this Court at any rate feels it is splitting hairs when you attempt to make a distinction between those absolutely essential employees who are engaged in the business of marketing for the members of the cooperative and those persons who keep the records.

I shall, therefore, find for the Plaintiff in the amount prayed for in the Complaint, and I will allow the Defendant—the Government—exceptions.

Mr. Winter: Your Honor, I am wondering, is your Honor finding that this corporation was exempt under Section 101(1)?

The Court: Yes.

Mr. Winter: Would you make that finding, your Honor?

The Court: I thought I made it clear. It is exempt under 101(1) and likewise under 101(12); and neither are exclusive of the other.

101(1) is comprehensive enough to cover (12) and it is, therefore, exempt under 101(1).

Mr. Winter: The point I was making is that such an exemption statute is strictly construed and I don't think there is any evidence that they are an association.

The Court: That is what we have been determining all morning.

Mr. Winter: In none of the cases that we have cited has any of those corporations ever been allowed any exemptions under 101(1).

The Court: Well, this will be one case where they will be, so far as this Court has the responsibility of determining. The Appeals Court may take another view, however.

Mr. Winter: I wanted just to point it out, your Honor.

The Court: In order that you may have it clear, I think when you get a transcript of what I have just said you will find that I bring this within the provisions of 101(1); that is, that it is an agricultural or horticultural organization; and then we go to the Social Security Tax that I referred to.

Mr. Fishburne: Which is 1426(4).

The Court: Yes.

(Whereupon, other matters were discussed and at 12:10 o'clock, p.m., May 16, 1949, hearing in this cause was adjourned.)

CERTIFICATE

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

EARL V. HALVORSON,
Official Reporter.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come regularly before this court on the 16th day of May, 1949, plaintiff having been represented by John W. Fishburne, and the defendant being represented by Assistant United States Attorney Thomas R. Winter, testimony having been taken and the court having considered said evidence, makes the following findings of fact and conclusions of law:

I.

That the Sumner Rhubarb Growers Association is a co-operative agricultural corporation, organized under the laws of the State of Washington, chapter 19 of Session Laws of 1923.

II.

That Clark Squire is now and was at all times hereinafter mentioned, the duly appointed, qualified and acting Collector of Internal Revenue for the State of Washington and Territory of Alaska.

III.

That the purposes for which the said association is formed are to pack, process, can, store, warehouse, handle and market fruit, vegetables, rhubarb and other agricultural and horticultural products, grown in the State of Washington, and to buy, process, pack, handle and sell all kinds of agricultural and

horticultural products, both for its own account and on commission for others, and to contract accordingly, and operate warehouses, canneries, cold storage plants, packing houses, wherever necessary or expedient in the carrying on of the business; that the primary purpose for the organization of the association is to handle the agricultural and horticultural products of its members upon a co-operative basis, and to handle all of such products of members who shall sign the standard marketing agreement of the association upon the basis of actual cost to the association, and an amount apportioned over the entire operations of any one season.

That the plaintiff has been engaged during the period for which the claims referred to hereinafter will cover, in Sumner, Washington, which is located within the Western district of Washington, southern division.

That during said periods the plaintiff has been engaged in warehousing, packing and selling rhubarb grown by its farmer members in the Sumner Valley; that all of the rhubarb handled by the plaintiff has been grown on the farms of members of the association, and practically all of the rhubarb sold is shipped from packing on the farm where it is grown; that the rest of the rhubarb which the plaintiff has handled during the period in question, is packed at the plaintiff's warehouse in Sumner, Washington; that all of the rhubarb, after being packed, is shipped from the plaintiff's rented warehouse.

IV.

That the operation of the Sumner Rhubarb Growers' Association, during the period from which said claims have been filed, were seasonal, extending from January to the middle of May of each year.

V.

That during the year 1931 the plaintiff established a status of exemption with the United States Internal Revenue Department under section 103(12) of the Revenue Act of 1928, and has maintained its tax exempt status for the years during the period from October 1, 1942, to June 30, 1946, for which the United States Collector of Internal Revenue has demanded that the plaintiff pay social security tax.

That for the period from October 1, 1942, to December 31, 1942, the plaintiff paid \$3.38, which payment was made January 9, 1943.

That the plaintiff paid social security tax for the period from January 1, 1943, to December 31, 1943, the sum of \$130.19, said payment being made quarterly from April 6, 1943.

That the plaintiff paid social security tax for the period from January 1, 1944, in the sum of \$137.27, said payment being quarterly from April 11, 1944.

That the plaintiff paid social security tax for the period of January 1, 1945, to March 31, 1945, the sum of \$70.11, said payment being made April 13, 1945.

That the plaintiff paid social security tax for

the period from January 1, 1946, to June 30, 1946, payments of the same in the amount of \$25.08 being made April 24th and July 30th, 1946.

That there has been duly filed with the defendant, Nov. 18, 1946, a claim for refund for each of the periods set forth above, copies of said claims being marked Exhibits "A," "B," "C," "D," "E," and made a part hereof by this reference.

That more than six months have expired since the filing of the said claims and each of them, and no refund has been made by the defendant.

That by letter of June 24th, written by Victor H. Self, Deputy United States Commissioner, plaintiff was advised that claim #499930, being exhibit "E" herein, was disallowed, and that remaining claims were being adjusted in accordance with the ruling.

That in accordance with the Commissioner's ruling, the defendant denied a refund under plaintiff's claims for the following employees: Manager, assistant manager, and all stenographers and office employees.

That as a result of said ruling the plaintiff will still have due and owing him the following amounts, as set forth hereinafter: for the year 1943 the sum of \$22.03; for 1944, the sum of \$27.00; for 1945 the sum of \$15.03; for 1946 the sum of \$25.08; that the total due as a refund is the sum of \$89.14.

Done In Open Court this 29th day of June, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

And from the foregoing findings the court concludes as follows:

Conclusions of Law

I.

That the court has jurisdiction over the parties to this action and over the subject matter thereof.

II.

That the plaintiff's claims for refund were duly filed with the Collector of Internal Revenue.

III.

That all of the plaintiff's employees are exempt from United States Social Security tax under title 26 U.S.C.A. sec. 10(1) and 101(12).

Done In Open Court this 29th day of June, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 29, 1949.

In the District Court of the United States, Western
District of Washington, Southern Division

No. 1157

SUMNER RHUBARB GROWERS'
ASSOCIATION,

Plaintiff,

vs.

CLARK SQUIRE, Collector Internal Revenue,
Defendant.

JUDGMENT

This matter having come regularly before this court on the 16th day of May, 1949, plaintiff having been represented by John W. Fishburne, and the defendant being represented by Assistant United States Attorney Thomas R. Winter, testimony having been taken and the court having made findings of fact and conclusions of law, and being fully advised in the matter, it is hereby

Ordered, Adjudged and Decreed that the plaintiff be and it is hereby awarded a judgment against the defendant in the sum of \$89.14, together with interest and costs.

Done In Open Court this 29th day of June, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 29, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

I, Charles H. Leavy, Judge of the United States District Court, Western District of Washington, Southern Division, sitting in the above case, and in accordance with title 28 U.S.C. 2006, (28 U.S.C. Sec. 842, as amended) of the Revised Statutes of the United States, as amended, do hereby certify that the acts done by the defendant in the above entitled case as Collector of Internal Revenue, in exacting and collecting the taxes for which judgment was entered in the above entitled case on this date, in the sum of \$89.14, with interest and costs as provided by law, were done under the direction of the Commissioner of Internal Revenue and in his official capacity as such Collector of Internal Revenue, and that the said defendant had probable cause for his acts, notwithstanding the fact that said tax and interest was erroneously collected and judgment has been rendered for refund thereon in this case.

Dated this 29th day of June, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 29, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Sumner Rhubarb Growers' Association, plaintiff above named, and to John W. Fishburne, Attorney for Plaintiff.

You and Each Of You, will please take notice that the defendant, Clark Squire, United States Collector of Internal Revenue for the State of Washington, appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on June 29, 1949.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

/s/ GUY A. B. DOVELL,
Assistant U.S. Attorney,
Attorneys for Defendant.

Copy of the within Notice of Appeal mailed to J. W. Fishburne, Attorney for Plaintiff, this 25th day of August, 1949.

MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDWAYNE,
Deputy.

[Endorsed]: Filed August 25, 1949.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte this day upon motion of defendant, through his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, for an order extending time for the filing of the record on appeal and docketing the within action in the Circuit Court of Appeals for the Ninth Circuit, to enable the defendant to procure a transcript of the testimony and other evidence offered at the trial, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the within appeal be, and it is hereby extended to fifty days from the first date of the Notice of Appeal, to-wit to the 23rd day of November, 1949.

Made and entered at Tacoma, Washington, this 28th day of Sept., 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Presented by:

/s/ GUY A. B. DOVELL,
Asst. U.S. Attorney.

[Endorsed]: Filed Sept. 28, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To: The Clerk of the Above Entitled Court:.

Defendant Clark Squire, United States Collector of Internal Revenue for the District of Washington, by and through his attorneys of record, J. Charles Dennis, United States Attorney for the Western District of Washington, Guy A. B. Dovell, Assistant United States Attorney for said district, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, pursuant to Rule 75(a) of Rules of Civil Procedure, as amended, hereby designates the entire and complete record in this case, including a transcript of all proceedings and evidence and all of the original exhibits, to be contained in the record on appeal.

/s/ J. CHARLES DENNIS,
U.S. Attorney.

/s/ GUY A. B. DOVELL,
Assistant U.S. Attorney.

/s/ THOMAS R. WINTER,

Assistant to the Chief Counsel, Bureau of Internal Revenue.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 16, 1949.

PLAINTIFF EXHIBIT 1

Treasury Department
Washington 25

Office of Commissioner of Internal Revenue. Address Reply To Commissioner of Internal Revenue and Refer to EmT:A:AA:5-AES

June 24, 1948.

Mr. E. S. Watts,
c/o Bunker, Tanner and Watts,
Tacoma, Washington

Dear Mr. Watts:

Reference is made to your letter dated June 8, 1948, relative to the claims filed by the Sumner Rhubarb Growers' Association, Post Office Box 86, Sumner, Washington, for refund of employers' tax in the total amount of \$366.03, under the provisions of the Federal Insurance Contributions Act for the period from October 1, 1942 through June 30, 1946.

The bases of the claims are (a) that the amounts thereof represent employers' tax erroneously paid with respect to the remuneration of certain individuals for services which, it is alleged, are excepted from "employment" as "agricultural labor", and (b) that the Association is exempt from income tax under Section 101(1) of the Internal Revenue Code, and, therefore, is not liable for Federal employment taxes.

In Bureau letter dated February 6, 1948, you

were advised that action on the claims was being held in abeyance pending a determination whether the Sumner Rhubarb Growers' Association is exempt under Section 101(1) of the Internal Revenue Code.

You state in your letter that, under date of May 19, 1948, you were advised that, since you had failed to submit the necessary information, the Commissioner had revoked the ruling of exemption issued on September 3, 1941 (1931), wherein the Association was granted exemption under Section 103(12) of the Revenue Act of 1928, and request that this office take formal action with respect to the claims.

Information on file in this office discloses that in Bureau letter addressed to the Association on January 15, 1948, under the symbols IT:P:ER-RBB, it was held that, since the information furnished indicates that the activities of the Association consist primarily of marketing agricultural products for its members, and in view of the provisions of Section 101(12) of the Internal Revenue Code, the Association is not entitled to exemption as an agricultural organization under the provisions of Section 101(1) of the Code. Accordingly, the Association was requested to furnish information for use in determining whether it is being operated in such a manner as to be entitled to exemption from Federal income tax under Section 101(12) of the Code. However, such information was not furnished, and, therefore, in Bureau letter dated March 12, 1948,

under the afore-mentioned symbols, the Association was informed that the exemption granted it under Section 103(12) of the Revenue Act of 1928, in Bureau letter dated September 3, 1931, was revoked, effective January 1, 1939, the effective date of the Internal Revenue Code. Such ruling was affirmed in Bureau letter addressed to the Association on May 19, 1948.

Inasmuch as the Association's request for exemption under Section 101(1) of the Internal Revenue Code has been denied, this office is unable to give favorable consideration to the Association's contention that all the services performed for it are excepted from "employment" for Federal employment tax purposes. In addition, since the information necessary to establish that the Association is exempt under Section 101(12) of the Code has not been furnished, the adjustment of the claims filed by the Association can be based only on the extent to which the services performed by the individuals involved are excepted as "agricultural labor" in accordance with the provisions of Section 1426(h) (4) of the Federal Insurance Contributions Act.

The information on file discloses that the activities of the Association consist of the receiving, handling, packing, and shipping of fresh rhubarb grown only by its members. Mr. F. W. Mattson, the manager of the Association, devotes about fifty per cent of his time to the Association during each five or six month season. About half of the time devoted by Mr. Mattson to the Association is spent

in the field or supervising the grading and packing of the rhubarb and the remaining half is devoted to the administrative functions of the Association. Mr. Amiel Goettsch is primarily the bookkeeper or office manager with about twenty-five per cent or less of his time devoted to unloading or warehouse work. In addition, during the periods involved in the claims, the Association employed a secretary and an office clerk as well as other individuals who performed services in connection with receiving, handling, packing, loading, shipping, and selling of the rhubarb.

In view of the provisions of Section 1426(h)(4) of the Federal Insurance Contributions Act, and on the basis of the information presented, it is held that the services performed after December 31, 1939, by the warehouse labor in the receiving, handling, packing, warehousing, and loading of the rhubarb, together with the direct supervision of such services, constitute "agricultural labor" for Federal employment tax purposes. However, services performed in connection with the repair and maintenance of the plant and its equipment, as well as clerical and sales services, do not constitute "agricultural labor" for such purposes. To the extent that the manager and the office manager engage in the direct performance or in the supervision of services, after December 31, 1939, which of themselves constitute "agricultural labor", they are considered to be engaged in "agricultural labor". Other services performed by such individuals constitute "employment".

Section 1426(c) of the Federal Insurance Contributions Act, in force on and after January 1, 1940, provides that if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term "pay period" means a period (of not more than thirty-one consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him.

The claims filed by the Association are being adjusted in accordance with the foregoing. When action thereon has been completed, the Association will be appropriately notified through the office of the collector of internal revenue for its district.

Very truly yours,

/s/ VICTOR H. SELF,

Deputy Commissioner.

AES:MVR

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON
APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11, as amended, of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as the Record on Appeal in the above entitled cause all of the original pleadings and papers on file and of record in said cause, in my office at Tacoma, Washington, as set forth below:

1. Complaint (1)
2. Summons and Marshal's Return of Service (2)
3. Stipulation extending time to answer (3)
4. Order extending time to answer (4)
5. Motion of defendants to Dismiss (5)
6. Notice of Hearing on Motion to Dismiss (6)
7. Order Dismissing United States as party defendant (7)
8. Answer (8)
9. Notice of Assignment for trial (9)
10. Reporter's Transcript of Oral Decision (10)

11. Letter, Winter to Fishburne, re Certificate of Probable Cause (11)
12. Findings of Fact and Conclusions of Law (12)
13. Judgment, for Plaintiff (13)
14. Certificate of Probable Cause (14)
15. Cost Bill, Plaintiff (\$39.60) (15)
16. Notice, defendant, of Appeal (16)
17. Order Extending Time (to 11/23/49) to File Appeal (17)
18. Designation of Contents of Record on Appeal (18)

I do further certify that I am also transmitting herewith the following original exhibits, admitted in evidence in the trial of the above entitled cause, to-wit: Plaintiff's Exhibit No. 1, and that said exhibit and the aforesaid original pleadings and papers constitute the Record on Appeal from the Judgment of the said District Court, filed June 29, 1949, and entered in the civil docket of said cause on said date.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 19th day of November, 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ E. E. REDMAYNE,
Deputy Clerk.

[Endorsed]: No. 12406 United States Court of Appeals for the Ninth Circuit. Clark Squire, Collector of Internal Revenue, Appellant, vs. Sumner Rhubarb Growers' Association, a Cooperative Agricultural Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed November 23, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12406

CLARK SQUIRE, Collector of Internal Revenue,
Appellant

vs.

SUMNER RHUBARB GROWERS' ASSOCIA-
TION,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON
WHICH HE INTENDS TO RELY ON AP-
PEAL

Now comes Clark Squire, Collector of Internal Revenue, appellant in the above entitled case, and states the points on which he intends to rely, as follows:

1. The trial court erred in concluding that the appellee's employees were exempt from the Federal Social Security Tax under Title 26 U.S.C., Section 101 (1) and 101 (12), or either of those sections.

2. The trial court erred in finding that the appellee had maintained a tax exempt status during the tax period from October 1, 1942, to June 30, 1946, involved in the action, or any portion of that period, and that it was entitled to a tax refund.

3. The trial court erred in awarding judgment for the appellee.

4. The trial court erred in holding that the services performed for the appellee did not constitute employment, under 26 U.S.C., Sections 1426 (b) (10) (A) and (B).

5. The trial court erred in failing to rule that the services performed for the appellee constituted employment under 26 U.S.C., Section 1426 (b); and were not exempt under Sections (l) and (h) of that Section.

/s/ THEON L. CAUDLE,
Assistant Attorney General,
Attorney for Appellant.

Receipt of the within Appellant's Statement of Points on which He Intends to Rely on Appeal is acknowledged this day of December, 1949.

.....
JOHN W. FISHBURNE,
Attorney for Appellee.

[Endorsed]: Filed December 23, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF
RECORD FOR PRINTING

Now comes Clark Squire, Collector of Internal Revenue, appellant in the above entitled case, and designates the entire record for printing.

/s/ THERON L. CAUDLE,
Assistant Attorney General,
Attorney for Appellant.

Receipt of the within Appellant's Designation of Record for Printing is acknowledged this..... day of December, 1949.

.....
JOHN W. FISHBURNE,
Attorney for Appellee.

[Endorsed]: Filed December 23, 1949.